

Brad Pedersen

From: Brad Pedersen
Sent: Friday, March 07, 2008 12:19 PM
To: 'Wong, Lut'
Subject: RE: FYI - Serial No. 09/878245

Examiner Wong:

Thank you for your response. I will make my arguments as part of a response after final.

Brad Pedersen

From: Wong, Lut [mailto:Lut.Wong@USPTO.GOV]
Sent: Thursday, March 06, 2008 4:42 PM
To: Brad Pedersen
Subject: RE: FYI - Serial No. 09/878245

Hi Brad,

I would not argue with you unless it is official. It is inappropriate for me to discuss anything on the merit off the record.

I would contact people in NRF to confirm should that be necessary. Since storeworks are hosted by NRF annually, and there is only 1 event in 1999 that are related to retail. The storework99 date can be figured out by the method of elimination.

Lut

From: Brad Pedersen [mailto:Pedersen@ptslaw.com]
Sent: Thursday, March 06, 2008 12:56 PM
To: Wong, Lut
Subject: RE: FYI - Serial No. 09/878245

Examiner Wong:

Thank you for the materials you are relying on as evidence of the date of the StoreWorks 1999 material. While maintaining my position that even if the StoreWorks 1999 material were prior art, the reference does not anticipate the inventions of claims 15-17, I would challenge the evidence you have provided that the StoreWorks 1999 materials can be properly considered as 102(b) for this application.

I note that there is no direct evidence of any date of the 1999 conference in terms of which of the several conferences held at various times in 1999 might be the correct conference and that your evidence of which conference you assume the material to be from is based on an inference from materials relating to 2000 NRF conferences that were identified based on a Wayback Machine archive link.

First, the use of evidence based on a Wayback Machine archive link is not valid evidence of publication of a 102 (b) reference as of a specified date.

“[T]he information posted on the Wayback Machine is only as valid as the third-party donating the page decides to make it--the authorized owners and managers of the archived websites play no role in ensuring that the material posted in the Wayback Machine accurately represents what was posted on their official websites at the relevant time.” Novak v. Tucows, Inc., 2007 WL 922306, *5 (E.D.N.Y. March 26, 2007).

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Second, the assumption that a conference date in one year is somehow related to a conference date in another year when those conferences have different titles is unsupported and cannot satisfy the proof of a specified publication date.

Third, even if there were some evidence of the specified date of a given conference title in 1999, there is still no evidence that the particular materials relied upon in the 102(b) rejection were, in fact, presented at that conference.

Finally, even assuming that the materials were presented at the conference at the purported date in May 1999, there still must be an analysis as to whether a presentation of the materials at a conference constitutes a printed publication for purposes of 102(b) and no such analysis has been made.

"The determination of whether a reference is a "printed publication" under 35 U.S.C. § 102(b) involves a case-by-case inquiry into the facts and circumstances surrounding the reference's disclosure to members of the public. *In re Cronyn*, 890 F.2d at 1161; *In re Hall*, 781 F.2d at 899. Accordingly, our analysis must begin with the facts of this case, none of which are in dispute.

[6] In this case, the Liu reference was displayed to the public approximately two years before the '950 application filing date. The reference was shown to a wide variety of viewers, a large subsection of whom possessed ordinary skill in the art of cereal chemistry and agriculture. Furthermore, the reference was prominently displayed for approximately three cumulative days at AACC and the AES at Kansas State University. The reference was shown with no stated expectation that the information would not be copied or reproduced by those viewing it. Finally, no copies of the Liu display were distributed to the public and the display was not later indexed in any database, catalog or library.

Given that the Liu reference was never distributed to the public and was never indexed, we must consider several factors relevant to the facts of this case before determining whether or not it was sufficiently publicly accessible in order to be considered a "printed publication" under § 102(b). These factors aid in resolving whether or not a temporarily displayed reference that was neither distributed nor indexed was nonetheless made sufficiently publicly accessible to count as a "printed publication" under § 102(b). The factors relevant to the facts of this case are: the length of time the display was exhibited, the expertise of the target audience, the existence (or lack thereof) of reasonable expectations that the material displayed would not be copied, and the simplicity or ease with which the material displayed could have been copied. Only after considering and balancing these factors can we determine whether or not the Liu reference was sufficiently publicly accessible to be a "printed publication" under § 102(b)." *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004).

If there is any other evidence or analysis supporting the proposition that the Storework 1999 materials is proper 102(b) prior art, I would appreciate an opportunity to review such evidence or analysis before submitting my response in this case.

Thank you

Brad Pedersen

From: Wong, Lut [mailto:Lut.Wong@USPTO.GOV]
Sent: Tuesday, February 19, 2008 4:37 PM
To: Brad Pedersen
Subject: FYI

Hi Pedersen,
As per our conversation, a courtesy copy of evidence can be found at
<http://web.archive.org/web/19991011044730/nrf.com/events/>
Which shows storkwork2000 is an event/conference hosted by nrf
Base on that, it can be shown that storkwork1999 is also hosted by nrf in May 16-19, 1999.

Lut Wong
Patent Examiner

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